



The Special Administrative Law Judge found claimant entitled to 28.5% permanent partial general body work disability for an accidental injury occurring May 28, 1991. Respondent appeals from the findings of the Special Administrative Law Judge and requests the Appeals Board review the finding of nature and extent of disability. Specifically, respondent argues that the claimant's disability should be based upon her functional impairment; but should a work disability be found to exist then respondent would urge that the weight of the credible evidence would support a smaller percentage of work disability than that found by the Special Administrative Law Judge.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record, the Appeals Board finds as follows:

Based upon the testimony of the claimant, the medical testimony, and the record taken as a whole, the Appeals Board finds claimant sustained an eleven percent (11%) permanent partial functional disability.

The Special Administrative Law Judge found that because claimant was laid off by the respondent from an accommodated job and was no longer engaged in work for a comparable wage, she had overcome the presumption of no work disability as contained in K.S.A. 44-510e(a) with regard to loss of ability to perform work in the open labor market. However, he further found that the respondent was nevertheless entitled to the presumption with respect to loss of ability to earn comparable wages due to the fact that respondent offered accommodated employment which the claimant was capable of performing. That offer would require claimant to work a different shift, which she declined to do because of personal considerations. The findings of the Special Administrative Law Judge, regarding nature and extent of disability are consistent with prior decisions by the Appeals Board except that the Appeals Board has generally found an offer of a position at comparable wage, accommodated or otherwise, does not create a presumption of no wage loss where the claimant does not actually engage in work at a comparable wage, but rather is evidence of ability to earn a comparable wage for purposes of determining that portion of the two prong test for work disability. The Special Administrative Law Judge's decision likely would have been affirmed, (with the exception of correcting certain percentage figures used by the Special Administrative Law Judge so as to conform those numbers to the vocational testimony in the record) but for the recent opinion by the Kansas Court of Appeals in the case of Foulk v. Colonial Terrace, Docket No. 71,139, (opinion filed December 16, 1994). Following the rationale employed by the Court of Appeals in their decision we now hold that the presumption of no work disability applies. Accordingly claimant's disability is limited to her functional impairment. Although claimant did not accept the job offered on second shift, she admitted and the evidence shows that she was capable of performing that work. The Court of Appeals in Foulk v. Colonial Terrace found that under such circumstances it is not necessary for a worker to actually engage in such work for the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e(a) to apply. In so holding, the Court of Appeals said:

"Construing K.S.A. 1988 Supp. 44-510e(a) to allow a worker to avoid the presumption of no work disability by virtue of the worker's refusal to engage in work at a comparable wage would be unreasonable where the proffered job is within the worker's ability and the worker had refused to even attempt the job. The legislature clearly intended for a worker not to receive compensation where the worker was still capable of earning nearly the same

wage. Further, it would be unreasonable for this court to conclude that the legislature intended to encourage workers to merely sit at home, refuse to work, and take advantage of the workers compensation system."

Accordingly, we hold that claimant's functional impairment shall be the measure of her disability. In this regard the record contains the opinion testimony of two medical experts. Dr. Ernest Schlachter examined claimant at the request of claimant's counsel. He found a full range of motion in claimant's right shoulder but with mild crepitus and a click if she raised her arm above the horizontal. She had complaints of tenderness in the right trapezius muscles and over the acromioclavicular joint of the right shoulder. There was no rotator cuff weakness but pain with use of the rotator cuff. She also had a significant loss of grip strength on the right, her dominant extremity. Her present complaints were of pain in her right wrist going up her right elbow, arm and shoulder. Repetitive gripping caused numbness in the fingers of her right hand. Vibratory tools caused her arm and shoulder to ache. Lifting more than ten to fifteen (10-15) pounds caused pain in her right wrist and hand. She had difficulty using her right arm above the horizontal. Dr. Schlachter diagnosed chronic sprain and overuse syndrome of the right upper extremity and right shoulder with tendinitis of the right shoulder and wrist. He assigned a ten percent (10%) permanent partial impairment of function to the right upper extremity which converts to six percent (6%) to the body as a whole and five percent (5%) permanent partial impairment to the body as a whole for the right shoulder. These combine to an eleven percent (11%) permanent partial impairment of function of the whole body. He did not ascribe an impairment to the left upper extremity.

Dr. Mark Melhorn rated both upper extremities at five percent (5%) each based upon subjective complaints which converts to four percent (4%) to the body as a whole. He did not rate the shoulders despite complaints in those areas, particularly on the right. He diagnosed tendinitis of the right and left hand and wrist areas.

Based upon the testimony of the claimant, the medical testimony, and the record taken as a whole, the Appeals Board finds claimant sustained an eleven percent (11%) permanent partial functional disability.

Although it was not argued nor made an issue on appeal, the Special Administrative Law Judge did address the question of how to treat the payment of temporary partial disability compensation. He deducted the total number of weeks of temporary partial disability from the 415 weeks available for payment. The Appeals Board previously decided in the case of Richardson v. Wichita Arms, Inc., Docket No. 176,396, that the proper method to account for the payment of temporary partial disability compensation is to convert the amount of temporary partial paid into a weekly equivalent by dividing the total sum of temporary partial disability benefits paid by the weekly temporary total disability benefit rate. Therefore, the two weeks of temporary partial disability benefits that respondent paid claimant during the pendency of this claim at the rate of \$141.11, represents the equivalent of one week temporary total disability which we find to be the correct figure to be used in calculating claimant's award.

The parties stipulated at regular hearing to a date of accident of May 28, 1991, but with aggravation through claimant's last day of work in April of 1992. Claimant testified that she was laid off April 19, 1992, due to a reduction in the work force. Accordingly, the date of April 19, 1992, will be used for purposes of computing compensation for the award rather than the May 28, 1991 date utilized by the Special Administrative Law Judge.

The Appeals Board adopts the findings and conclusions set forth by the Special Administrative Law Judge in his Award dated February 7, 1994, that are not inconsistent with those expressed herein.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey, dated February 7, 1994, shall be, and is hereby, modified as follows:

**AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Valerie L. Seely, and against the respondent, Beech Aircraft Corporation, a qualified self insured, for an accidental injury which occurred April 19, 1992, and based upon a average weekly wage of \$458.51, for 18.57 weeks of temporary total disability compensation for the period from September 6, 1991 through January 12, 1992, at the rate of \$289.00 or \$5,366.73 and one (1) week of temporary total disability compensation for the equivalent period of temporary partial disability at the temporary total rate of \$289.00 per week or \$289.00, followed by 395.43 weeks at the rate of \$33.63 or \$13,298.31 for an eleven percent (11%) permanent partial general body impairment of function, making a total award of \$18,954.04.

As of December 21, 1994, there is due and owing claimant 18.57 weeks of temporary total disability compensation at the rate of \$289.00 or \$5,366.73, and one (1) week of temporary total disability compensation for the equivalent period of temporary partial disability at the temporary total rate of \$289.00 per week or \$289.00, followed by 120 weeks of permanent partial disability compensation at the rate of \$33.63 per week in the sum of \$4,035.60, for a total of \$9,691.33 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$9,262.71 is to be paid for 275.43 weeks at the rate of \$33.63 per week, until fully paid or further order of the Director.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December, 1994.

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BOARD MEMBER

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**DISSENT**

I respectfully disagree with the majority opinion. Although the majority finds respondent offered claimant an accommodated position on a different shift at comparable pay, the record does not contain that evidence. No evidence was presented regarding the position claimant would be given or the wages she would be paid. Therefore, the presumption of no work disability should not apply and the claimant is entitled to work disability.

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BOARD MEMBER

cc: Thomas E. Hammond, Attorney at Law, Wichita, KS  
Terry J. Torline, Attorney at Law, Wichita, KS  
William F. Morrissey, Special Administrative Law Judge  
George Gomez, Director